IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 151 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BACHUBHAI ALIAS RATANSINH AMBALAL CHAUHAN

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 151 of 1991

MR HL MENGHANI for Petitioner No. 1-3

Mr. Pancholi, APP for Respondent State.

CORAM : MR.JUSTICE K.A.PUJ

Date of decision: 16/10/2003

CAV JUDGEMENT

This Criminal Appeal is filed by the appellants-original accused Nos. 1, 2 & 3 against the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Baroda, dated 27th February 1991 in Sessions Case No. 157 of 1990. The appellants were tried in the Court of learned Additional

Sessions Judge, Baroda for the alleged commission of offences made punishable under Section 302 read with Sec. 34 and 114 of Indian Penal Code and also for the offences punishable under Section 134 r/w. 37(1) of the Bombay Police Act.

2. The brief facts, giving rise to the present Appeal, are as under:

That the incident in question took place on 1st August 1990 at about 10.00 O'Clock in the night at Village Sherkhi in Baroda District. It was the case of prosecution that the deceased Ganpatsinh Fatehsinh and the informant Ramanbhai Fatehsinh were brothers and they were residing in outskirts of the Village Sherkhi. There was a dispute going on between the appellants-accused on the one side and Ramanbhai and his deceased-Ganpatsinh on the other side in respect of recovery of some amount for purchase of utensils made for and on behalf of their community Panchayat. There was some enmity prevailing between the parties on account of some old dispute regarding land. The deceased had some altercation with the appellants on 1.8.1990 at about 8.30 PM and soon thereafter they had separated and went to their respective places.

3. It is the case of prosecution that it was raining at the night and deceased Ganpatsinh and informant Ramanbhai learnt that beam of the house situated in the village itself near the house of the accused had fallen down. They, therefore, went to see the condition of their house. It was about 10.00 O'Clock in the night and while they were returning, the appellants-accused met them and told that why they have gone there. The prosecution case further shows that in the meantime other two appellants also came there and surrounded the deceased and Ramanbhai. According to the prosecution, the appellants were armed with the stick at that time. The allegation further is that soon thereafter the appellants started beating the deceased and his brother. It is further alleged that the appellant No.3 i.e., Dilipsinh gave stick blow on the head of the deceased with the result the deceased fell down. The other two appellants thereafter gave stick blows on his legs, chest and shoulder. It was further alleged by the prosecution that brother of the deceased, i.e., Ramanbhai tried to intervene and rescue his brother, but he was also assaulted by the appellants. It was further alleged that the appellant No.3 gave a stick blow on his head whereas appellant No.2 gave stick blow on the right hand and shoulder. To save himself from the attack, Ramanbhai ran

away from the spot leaving his brother Ganpatbhai there. Another brother of the deceased namely, Chitrasinh learnt about the incident and he, in the company of his brother-in-law Sardarsinh and also Ramanbhai went to the police station to lodge complaint against the appellants.

4. It is further stated that it is borne out from the prosecution evidence that the appellants were also assaulted by Ramanbhai and appellant No.3, i.e., Dilipsinh had sustained injury on the vital parts of his body by means of a knife. When the informant Ramanbhai and his brother-in-law Sardarsinh and Chitrasinh went to the police station, complaint was already lodged by the appellants-accused against Ramanbhai for the offences under Section 324 read with Section 34 r/w. 114 of the IPC which was registered as C.R. No. I-98 of 1990. This offence was registered by prosecution witness No.10, namely Nanubhai Babubhai on the strength of a message given to him by the Police Head Constable on duty at the hospital. The police thereafter registered the offence against the present appellants on the strength of the complaint filed by Ramanbhai and others at about 1.15 a.m. in the night, as C.R. No. I-99 of 1990 and since the offence was of serious nature, due intimation was given to the superior officers. On receipt of the complaint, the police commenced the investigation and Police Sub-Inspector, Jaidev C. Solanki who at the relevant time was attached to the Baroda Taluka police station, reached Village Sherkhi and inspected the spot. He had found that Ganpatsinh was already dead and hence the arrangement for inquest Panchnama was made and thereafter the dead body of deceased Ganpatsinh was sent to the hospital for post mortem examination. After completing the investigation, the police submitted chargesheet in the Court of learned Judicial Magistrate (FC), Baroda against the present appellants for the offences mentioned hereinabove.

5. Since one of the appellants was also injured and offence was registered in respect thereof, the police had also commenced investigation in that case and had filed chargesheet against Ramanbhai. Both these cases thereafter were committed to the Court of Sessions. Since the offences under Sections 302 and 307 were exclusively triable by the Court of Sessions, the case against Ramanbhai being a cross-case of the present case was also committed to the Court of Sessions and the cross-case was numbered as Sessions Case No. 24 of 1990.

6. It is further stated that at the trial, the appellants had not pleaded guilty and claimed to be

tried. Their defence was that they were absolutely innocent and it was stated that the complainant and his brother deceased Ganpatsinh were the aggressors who had attacked them first and the appellants were, therefore, required to exercise their right of private defence.

7. It is further stated that the learned Additional Sessions Judge, Baroda, at the end of the trial, by judgment and order dated 27th February 1991, convicted the present appellant No.1 for the offences made punishable under Sections 326 and 324 of the Indian Penal Code and sentenced them to suffer imprisonment for a period of 3 years and to pay a fine of Rs. 350/=, in default, further rigorous imprisonment for 6 months for offences under Sec. 326 of the Indian Penal Code and was also sentenced to suffer R.I. for one year and to pay a fine of Rs. 150/=, in default to suffer R.I. for 3 months for offences made punishable under Section 324 of the IPC. So far as appellant No.2 is concerned, he was convicted for the offence under Sec. 324 of the IPC and was sentenced to suffer R.I. for one year and to pay a fine of Rs. 250/=, in default further R.I. for 3 months. So far as the appellant No.3 is concerned, he was convicted for the offences under Part-II of Section 304 of the IPC and sentenced to suffer R.I. for a period of 4 years and to pay a fine of Rs. 500/-, in default to undergo R.I. for 3 months. He was also convicted for the offence under Section 324 of the IPC and was sentenced to suffer R.I. for one year and to pay a fine of Rs.150, in default to suffer R.I. for 3 months. The learned Additional Sessions Judge had also directed that all the sentences of the accused to run concurrently.

8. So far as other Sessions Case No. 24 of 1990 is concerned, the learned Sessions Judge, vide his judgment and order dated 25th February 1991 convicted the accused, namely Ramanbhai for the offences under Sec. 324 of the IPC and sentenced to suffer R.I. for one year and to pay a fine of Rs. 150/-, in default to suffer R.I. for 3 months.

9. It is this order of the learned Additional Sessions Judge, Baroda, dated 27th February 1991 in Sessions Case No. 157 of 1990 which is under challenge in this Criminal Appeal filed by the appellants, original-accused.

10. Mr. HL Menghani, ld. advocate appearing for the appellants, original-accused, submits that the judgment and order of conviction and sentence passed by the learned Sessions Judge is contrary to the provisions of

law and not based on weight of evidence of the case. He has further submitted that the impugned judgment and order of conviction and sentence passed on inferences not warranted by facts and on presumptions not permitted by law. He has further submitted that the prosecution had failed to establish the case against the appellants beyond reasonable doubt and hence they are required to be acquitted. It is further submitted that the learned Sessions Judge has failed to appreciate that there was no independent and reliable evidence of the case to base conviction of the appellants. He has further submitted that the evidence produced on behalf of prosecution suffers from number of inherent infirmities and hence there was hardly any reliable evidence on record to establish the guilt of the appellants. The evidence produced by the prosecution was not sufficient to hold the appellants guilty of which they were charged with. He has further submitted that the oral evidence led by the prosecution was not in accordance with the medical evidence on record, and on this sole ground the prosecution's case requires to be thrown overboard. He has further submitted that there were number of inherent discrepancies between the oral account of the incident given by the witnesses and the medical evidence produced by the prosecution which was not reconciled and hence the prosecution's case should be failed on that count alone.

11. Mr. Menghani has further submitted that it was the case of prosecution that all the present appellants were armed with stick at the time of incident and that they had caused injuries to the deceased and to Ramanbhai by means of those sticks and no use of any sharp-cutting instrument or weapon was alleged to have been made by the appellants at any point of time as per the prosecution's case. Despite this fact, the medical evidence in the nature of post mortem notes of the deceased shows that the injuries suffered by the deceased by means of sharp-cutting instrument. The postmortem notes produced on the record by the prosecution at Exh. 18 shows the injuries described at Column No. 17. Injuries shown at Sr. No. 1, 1(b), 2 and 3 show that they were incised wounds which could only be caused by a sharp-cutting instrument. These injuries could not be caused by a hard and blunt substance like stick. This version of the medical evidence in all probabilities indicates that the deceased must have been assaulted by a sharp-cutting instrument at the time of incident. No prosecution witness, however, had said that any of the appellants was armed with any sharp-cutting instrument and that he had caused those injuries to the deceased. Mr. Menghani has further submitted that the Medical Officer who had

carried out the post mortem examination was not right when she deposed before the Court that such injuries would be caused by hard and blunt substance.

12. Mr. Menghani has further submitted that according to the prosecution, the deceased Ganpatsinh and Ramanbhai had gone to village Sherkhi near the house of the deceased to have inspection of their house because, according to them, a beam of their house had fallen down due to heavy rain. It has come on record that the deceased and prosecution witness Ramanbhai did not have any house in the village near the house of the accused. They were residing on the outskirts of the village which is quite at a distance from the house of the accused. The deceased and prosecution witness Ramanbhai had therefore no reason to go near the house of the accused at about 10.00 O'Clock at night and that too at the time when there was heavy rain. He has further submitted that the prosecution has deliberately suppressed the true motive of their visit to the place near the house of the accused. Mr. Menghani has submitted that the prosecution witness Ramanbhai had made certain improvements while giving evidence before the Court at the time of trial in the version of the incident. He had done so with the purpose of suppressing the real reason for their presence near about the house of the appellants at the time of incident.

13. It is further stated that one of the assailants, namely, Dilipbhai had sustained injury with sharp-cutting instrument like knife. It was prosecution witness Ramanbhai who had caused that injury to Dilipbhai. Prosecution witness Ramanbhai, however, did not utter a word about the injury caused to Dilipbhai in his presence before the Court. Mr. Menghani has further submitted that over and above suppressing the true purpose of their visit to the place near the house of the appellants at the time of incident, the prosecution witness Ramanbhai has also tried to suppress the true facts regarding origin of the incident and has also not explained as to how the injuries were caused to the appellant Dilipbhai at the time of incident. All the three factors were therefore sufficient to discard the prosecution case. He has further submitted that the prosecution witness Ramanbhai was also prosecuted for causing injury to one of the appellants, namely Dilipbhai at the time of incident and at the end of trial he was convicted for the offence under Sec. 324 of the IPC and was sentenced to suffer R.I. for one year. The fact that one of the appellants was injured by prosecution witness Ramanbhai at the time of incident was duly proved and despite this

fact, the prosecution had not made any effort to explain the injury suffered by one of the appellants at the time of incident. He has further submitted that non-explaining of the injuries on the person of the appellants by the prosecution was fatal to its case and it deserves to be rejected only on that count.

14. Mr. Menghani has further submitted that from the record it emerges that it was the deceased and prosecution witness Ramanbhai who had gone to the place of the accused at night at about 10.00 O'clock and then the incident had taken place where one of the appellants had also suffered serious injuries. It was the deceased and prosecution witness Ramanbhai who had gone there with the intention of attacking the appellants and in fact had caused injuries to one of the appellants, namely Dilipbhai. It is therefore quite clear that the appellants might have tried to defend themselves and while doing so the deceased might have received injuries. The appellants were therefore completely justified in exercising their right of self-defence.

15. Mr. Menghani has further submitted that the prosecution witness Ramanbhai himself had admitted that the whole incident had taken place near the house of Bachhubhai and that they did not have any house near the house of the accused. The prosecution had not examined any independent witness in respect of their case even though the incident had taken place in a residential locality and independent witness could have been available to it. The explanation given by the prosecution in this regard could not have been believed as the prosecution witness Ramanbhai in his evidence has stated that he did not raise any shouts when they were attacked and nobody came at the place of incident. The conduct of the prosecution witness Ramanbhai was highly unnatural inasmuch as any person put in the position of prosecution witness Ramanbhai would have raised shouts for help. If he had been attacked by persons armed with sticks, no other inference can be drawn on the unnatural conduct of prosecution witness Ramanbhai. As a matter of fact, he had not raised shouts establishes that he himself was the assailant or that he did not want any independent person to be a witness of this incident.

16. Mr. Menghani has further submitted that except the evidence of prosecution witness Ramanbhai, there was no other independent eye witness examined by the prosecution, though according to prosecution witness Ramanbhai himself, many persons were residing round about the place of incident. He has further submitted that

both the cases, i.e., the case against the appellant and the case against the prosecution witness Ramanbhai were tried together and the learned Judge has convicted the appellants as well as the prosecution witness Ramanbhai. It is therefore a grave error committed by the learned Sessions Judge in doing so. The prosecution witness Ramanbhai has been guilty of offence under Section 324 of the Indian Penal Code, and hence the learned Judge ought to have given benefit of right of self-defence to the appellants.

17. Mr. Menghani has further submitted that the incident was not as a result of a common intention of the appellants as it has come on record that the incident took place near the house of the appellants and P.W. Ramanbhai and the deceased Ganpatsinh had gone at about 10.00 O'Clock in the night. He has further submitted that even if it is assumed that the appellants were responsible for causing injuries to deceased Ganpatsinh, each one of them would be independently liable for the injuries caused, the prosecution has not proved by leading cogent evidence as to which injury was caused by which appellant and in that event all the appellants should have been convicted for the minimum offence, i.e., offence under Section 323 or 324 of the Indian Penal Code. This was more so, in view of the fact that according to the medical evidence, none of the injuries, of its own, was sufficient in ordinary course of nature to cause death.

18. Mr. Menghani, in support of his contention regarding right of self-defence, relied on the decision of the Hon'ble Supreme Court in the case of Buta Singh v. The State of Punjab - AIR 1991 S.C. 1316, wherein it is held that having regard to the nature of the incident, it is difficult to say that he exceeded the right of private defence for the obvious reason that he could not have weighed in golden scales in the heat of the moment the number of injuries required to disarm his assailants who were armed with lethal weapons. The Court has, therefore, rejected the submission of the learned counsel for the State that the appellant had exceeded the right of private defence.

19. Mr. Menghani has further relied on the decision of the Hon'ble Supreme Court in the case of Nabia Bai v. State of Madhya Pradesh - AIR 1992 SC 602, with regard to right of private defence of person. The Hon'ble Supreme Court has held that it is abundantly clear that the appellant neither had any motive nor had any intention to kill the deceased. She only wanted to save herself from

an armed intruder who had inflicted knife injuries on her. The Court was satisfied that the appellant acted in her right of self defence and the appellant was acquitted on that ground.

20. He has further relied on the decision of the Hon'ble Supreme Court, in the case of Ram Phal and Others v. State of Haryana - AIR 1993 SC 1979, for the proposition that accused cannot be said to have exceeded the right of private defence and benefit of doubt should be given to the accused. In this context, it is held by the Hon'ble Supreme Court, that "it has to be noted that the accused need not establish their right beyond all reasonable doubt. It is enough if a reasonable doubt arises on examination of the probabilities of the case. In the case before the Supreme Court, it was found that the accused persons received fairly number of injuries and some of them were on vital parts. The prosecution has no plausible explanation. In such a situation, the plea put forward by the accused appears to be quite probable and, therefore, it cannot be rejected. The next question is whether they have exceeded the right of private defence. Only one overt act is attributed to A-1. It is clear that he inflicted only one injury and dealt one blow on his head. Therefore, in such a situation, it cannot be said that the act of A-1 is not in conformity with the limitations laid down in Section 100, I.P.C." The Court has, therefore, given benefit of doubt to all the accused as such by holding that they have not exceeded the right of self-defence.

21. Mr. Menghani has further relied on the decision of the Hon'ble Supreme Court in the case of Makwana Takhat Singh Ratan Singh vs. State of Gujarat - AIR 1992 SC 1989 wherein the Hon'ble Supreme Court has held that to decide as to who was the aggressor this becomes necessary particularly when the accused had come forward with a plea that the prosecution party was the aggressor. The fact that some incised injuries were found on one of the accused itself shows that one of the members of the prosecution party used the sharp-edged weapon. No doubt, some of the prosecution witnesses are also injured but likewise some of the accused persons also received injuries. In this state of affairs, the view by the trial court that the accused party acted in exercise of right of private defence is not unreasonable as to warrant interference in an appeal against acquittal.

22. With regard to his contention that the prosecution has failed to explain injuries on the person of one of the appellants, he relied on the decision of

the Patna High Court in Sarjug P. Singh and Others vs. State of Bihar - 1984 Cri.L.J. 1086, wherein it is held as under :

> "If there is a riot, assault and counter-assault, it is obligatory for the prosecution to come to court with a clean hand and to explain the injuries caused to the other side. If the injuries on the accused are so superficial and small that might not be visibly seen and noticed, non-explanation thereof, may not jeopardise the trustworthiness of a prosecution witness. But if the injuries are quite perceptable and are such which might not go unnoticed, and the evidence transpires that the accused also got injuries in the same incident, a duty is cast on the prosecution to explain the same."

23. With regard to his contention that the Sessions Judge has based his decision solely on the evidence of a solitary eye witness who is an interested party, Mr. Menghani relied on the decision of the Hon'ble Supreme Court in the case of Toran Singh vs. State of M.P. 2003 (1) GLH 244, wherein it is held that, "Apart from material contradictions and omissions in the statements of witnesses, these factors clearly indicate the serious infirmities and improbabilities of the prosecution case giving rise to grave doubts as to the involvement of the appellant in the commission of the offence." It is further observed that the trial court was not right and justified in lightly brushing aside the infirmities and improbabilities brought out from the prosecution case, that too when the entire prosecution case rested on the sole eyewitness, who was interested being the son of the deceased; more so in the absence of any corroboration of his evidence by other independent evidence on material aspects of the prosecution case. It is further observed that it is unfortunate that the High Court has simply endorsed the conviction and sentence passed by the trial court without objectively and satisfactorily scrutinizing and examining the evidence as a first court of appeal narrating the prosecution case and referring briefly to the evidence of a few prosecution witnesses.

24. Mr. Menghani has further relied on the decision of the Hon'ble Supreme Court in the case of State of Rajasthan vs. Shri Teja Singh & Ors. - 2001 (1) Supreme 621, wherein State's appeal against acquittal was

dismissed by the Hon'ble Supreme Court inter alia on the ground that the eye witnesses were interested witnesses, and their evidence was not corroborated by independent witnesses available. In that the Court has taken note of the fact that apart from the interested eye-witnesses produced by the prosecution many other villagers would have atleast seen the last part of the occurrence including the escape of the accused and the accused not being strangers to those villagers could have easily identified them. By not examining those independent witnesses, the prosecution has failed to produce the available independent corroborative evidence to support the evidence of interested witnesses, because of which the High Court was justified in drawing adverse inference against the prosecution.

25. Mr. Menghani has further relied on the decision of the Hon'ble Supreme Court in the case of Kalyan & Ors. v. State of U.P. - 2001 (7) Supreme 330, wherein it is held that "Keeping in view the facts and circumstances, particularly the variance between the F.I.R. and the depositions made in the court, the mention of gun shot injuries in the panchnama and their absence in the F.I.R., the conflict between the statements of eye-witnesses and the medical evidence and major contradictions and improvements in the depositions of the eye-witnesses, the Court was of the view that the prosecution failed to prove their case against the appellants beyond all shadows of doubt.

26. Mr. Menghani further relied on the decision of the Supreme Court in the case of Sohan & Anr. v. State of Haryana & Anr. - 2001 (2) Supreme 405, wherein it is held that "When the approach of the Court is one sided and conviction is based on the evidence of an eye witness who is not only interested but also inimical to the accused and does not inspire confidence and is not supported by corroboration of available evidence, the conviction is not supportable in law.

27. Mr. Pancholi, learned Additional Public Prosecutor, on the other hand, supported the order of the learned Additional Sessions Judge and submitted that he has discussed threadbare the entire evidence and after due appreciation of the said evidence the impugned order was passed by him which does not require any interference by this Court. He has further submitted that the evidence of the complainant is very relevant. He was an injured eye witness and his presence was very much there at the time of occurrence of the incident. His evidence was further corroborated by the medical evidence which

has come on record. In the deposition of Dr. Vaisakiben, Exh. 15, she has specifically stated that the deceased died because of the injuries received by him on his head as well as on the chest. With regard to self-defence, Mr. Pancholi has stated that accused No.1 has not stated anything in his statement recorded under Section 313 of the Criminal Procedure Code. So far as the credibility of the evidence of the prosecution witness Ramanbhai is concerned, Mr. Pancholi relies on the decision of this Court in the case of State of Gujarat vs. Bharwad Jakshibhai Nagribhai - 1989 (2) GLH 263, wherein it is held as under :

"For appreciating the evidence of injured witnesses the Court should bear in mind :-

(1) Their presence at the time and place of the occurrence cannot be doubted.

(2) They do not have any reason to omit the real culprits and implicate falsely the accused persons.

(3) The evidence of injured witnesses is of great value on the Prosecution and it cannot be doubted merely on some supposed natural conduct of a person during the incident or after the incident because it is difficult to imagine how a witness would act or react to a particular incident. His action depends upon number of imponderable aspects.

(4) If there is any exaggeration in their evidence, then the exaggeration is to be discarded and not their entire evidence.

(5) While appreciating evidence the Court must not attach undue importance to minor discrepancies, but must consider broad spectrum of the prosecution version. The discrepancies may be due to normal errors of perception or observation or due to lapse of memory or due to faulty or stereotype investigation.

(6) It should be remembered that there is a tendency amongst the truthful witnesses also to back up a good case by false or exaggerated version. In this type of

situation, the best course for the Court would be to discard exaggerated version or falsehood but not to discard entire version. Further, when a doubt arises in respect of certain facts stated by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story."

With regard to the independent witnesses, they have not been examined by the prosecution in the case of a murder and with regard to the evidence of the relative of the deceased, it is held by this Court in the said decision as under :

"Further, the Court should bear in mind that merely because the Prosecution has failed to produce any independent witness to the murder or to the incident which took place in the bazaar which normally would be thickly populated area would be no ground to throw out or doubt the version of injured witnesses or the evidence of relatives of the deceased who on the evidence as it stands were accompanying the deceased and whose presence cannot be doubted for any other reason. The Court should take into consideration the glaring prevailing fact in the society that independent witnesses are not forthcoming to assist the investigating agency for various reasons such as terror by the accused, danger to their life or property because of the accused, harassment at the investigation stage, repeated adjournments in the Court and on some occasions irrelevant piercing cross-examination by the defence counsel. Therefore, merely because the Prosecution has failed to examine so-called independent witnesses to the murder or incident would be no ground for discarding the evidence of the Prosecution witnesses who may be either the injured or relative of the deceased accompanying the deceased."

29. He has further submitted that the injured witness should be considered to be the best eye witness, and the discrepancy in his evidence which does not shake the basic version of the Prosecution case may be discarded. He has therefore submitted that the omission, discrepancy and exaggeration, if any, found in the evidence of Ramanbhai have to be discarded and such discrepancy and exaggeration are not glaring to the extent that whole

prosecution case becomes weak. He has further submitted that even the accused also sustained injury in the same occurrence in which the deceased died and hence the prosecution's failure to explain the injuries would not falsify its case. With regard to the motive, Mr. Pancholi has submitted that when there is ample evidence to prove that accused persons caused injury to deceased Ganpatsinh and Ramanbhai, the motive becomes immaterial. He has further submitted that on the basis of the evidence available on record at the time of the trial, oral as well as documentary and in view of the fact that the evidence of the eye witness was also available, and on the basis of the settled legal position so far as the criminal proceedings are concerned, the learned Additional Sessions Judge has correctly taken the decision and the same should not be interfered with by this Court in the present Appeal as the appellants had failed to point out any infirmity or illegality committed by the trial court while convicting the appellant and awarding the sentence. He has therefore submitted that the Appeal of the appellants should be dismissed.

30. I have heard the ld. advocate, Mr. HL Menghani, appearing for the appellant-accused and also the learned Addl. Public Prosecutor, Mr. Pancholi appearing for the respondent State. I have gone through the order passed by the learned Sessions Judge and also examined the case records and various documentary evidence produced before the Court. The ld. advocate appearing for the accused-appellants has made an endeavour to demonstrate that the appellants-accused have not committed any offence for which they were prosecuted and convicted and hence the order and judgment passed by the ld. Sessions Judge which is under challenge in the present Criminal Appeal is required to be quashed and set aside. He has also relied on several authorities in support of his various contentions raised before this Court.

31. If I turn to the depositions of the witnesses of the prosecution, the deposition of Shri Ramanbhai at Exh. 12 is very relevant as he is the eye witness to the event which had taken place. His statement clearly reveals that the accused No.3 Shri Dilipbhai had given a stick blow on the head of the deceased Ganpatsinh and he fell down. After he fell down accused No.1 Shri Bachhubhai started beating the deceased with the stick. When he tried to prevent them the accused No.3 had also given a stick blow on his head. The accused No.2 rushed with stick and gave stick blow on his head. This statement of the eye witness cannot be brushed aside merely because he

is an interested party or on the ground that the accused have acted in self-defence or that there were some contradictions.

32. Prosecution witness Dr. Dilipbhai Chokshi in his deposition at Exh. 14 confirmed that Ramanbhai had got injury on the left part of his head and on the left ear. There was also an injury on the left hand. He has also confirmed that such injuries can be caused by stick blow. Another prosecution witness, namely Dr. Vaisakia Dave who had made post mortem in her deposition at Ex.15 had stated that the deceased died because of various injuries caused to him and as a result thereof he was shocked and died. She had further stated that injuries on head as well as on chest were sufficient to cause death in a natural course.

33. The above depositions are further corroborated by the medical reports. Post mortem report supports the version of the prosecution that deceased died as a result of injuries suffered by him. It is confirmed that injuries in question may be caused because of stick blows. The possibility of use of knife and thereby creation of doubts or suspicions would not absolve the accused from their involvement in causing death of the deceased.

34. The arguments of the defence counsel are that though the prosecution witness Shri Ramanbhai is an eye witness, he is an interested and related witness and hence the appellants accused could not be held to be guilty on the sole evidence of the said interested witness. In the case of State of Orissa vs. Lodu Swain and Ors - JT 2003 (Suppl.) S.C. 576, the Hon'ble Supreme Court has held that from the evidence adduced in this case, it is true that they shared a common intention in causing grievous injuries to deceased Ganiha. The evidence of eye witnesses clearly establishes that these respondents actively participated in the crime by causing injuries to the deceased.

35. As far as the related witness is concerned, the Hon'ble Supreme Court in the case of Amzadkha and Others vs. State of Assam (2003) 6 SCC 270, has held that there is no rule of any presumption that the evidence of a related witness will always be an interested one or that such witness will have only a hostile attitude towards the accused facing trial. The Court has further observed that except making a bald cry that independent and impartial witnesses were withheld it was not even brought on record in some form or the other as to who such persons could be and who according to the defence stand,

were otherwise present nearby, but were not examined and otherwise withheld.

36. Even in the case of Munshi Prasad vs. State of Bihar (2002) 1 SCC 351, the Hon'ble Supreme Court has held that the Court should scrutinise evidence more carefully and if on such scrutiny their evidence is found to be trustworthy, same cannot be rejected merely on ground of being interested. The Hon'ble Supreme Court has further held in the case of Bhagwan Singh Vs. State of M.P. (2002) 4 S.C.C.85 that when the testimony of prosecution witnesses was cogent, reliable and confidence-inspiring, it cannot be discarded merely on the ground that the said witnesses happened to be the relations of the deceased.

37. In the light of the aforesaid decisions, the defence version cannot be accepted for discarding the evidence of Shri Ramanbhai merely on the ground that he is an interested witness or he is in relation to the deceased.

38. The second defence, which was raised by the defence counsel is that whatever was done by the accused was done in their private defence. As far as the plea regarding private defence is concerned, the Hon'ble Supreme Court in the case of Laxman Singh vs. Poonam Singh - 2003 AIR SCW 4566, has held that :

> "Section 96 does not define the expression 'right of private defence'. It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the Court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the Court to consider such a plea. In a given case the Court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record. Under S. 105 of the Evidence Act, the burden of proof is on the

accused, who sets of the plea of self-defence, and, in the absence of proof, it is not possible for the Court to presume the truth of the plea of self-defence. The Court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not required to call evidence he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging anyburden. Where the right of private defence isi pleaded, the defence mustbe reasonable and probable version satisfying the Court that the harm caused by accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record."

It is further held by the Hon'ble Supreme Court that:

"The number of injuries is not always a safe criterion for determining who the aggressor was. It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had received injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probabilises the version of the right of private defence. Non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance. But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies to cases where the injuries sustained by the accused are

> minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweights the effect of the omission on the part of the prosecution to explain the injuries."

The next defence of the defence counsel was that lot of contradictions in narration and happening of the events were found. With regard to such contradictions, inconsistencies, exaggerations etc., the Hon'ble Supreme Court in the case of Thamankumar vs. State of Union Territory of Chandigarh (2003) 6 SCC 380 has held that the conflict between oral testimony and medical evidence can be of varied dimensions and shapes. The same inference cannot be drawn in all categories of apparent conflict in oral and medical evidence. The manner and method of assault, the position of the victim, the resistence offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of occular testimony.

39. Even one of the contentions raised by the defence counsel was that when the event had taken place there was neither any shout nor any cry and hence the prosecution version cannot be accepted involving the accused appellant in the commission of the crime. In this connection, in the case of Vijay Pal Singh vs. State (2001) 10 SCC 45, the Hon'ble Supreme Court rejected the contention of the defence that since the mother of the accused on finding her son shot-at had not raised a hue and cry, her evidence did not fit with the natural conduct of the kith and kin of the deceased.

40. It is also important to give due weightage to the evidence of injured witness. Here in the case on hand, Shri Ramanbhai himself was injured and hence his evidence is much more important. In this connection, the Hon'ble Supreme Court has held in the case of Mohar vs. State of U.P. (2002) 7 SCC 606, that testimony of an injured witness has its own efficacy and relevancy. The very fact that a witness sustained injury shows the presence of such witenss at the scene. Hence, convincing evidence is required to discredit an injured witness.

41. Thus, taking overall view of the matter and after appreciating the entire evidence on record and after giving anxious thoughts to the authorities cited before

the Court, there is foregone conclusion that the accused are involved in commission of crime and the learned Sessions Judge has rightly decided the criminal case. The impugned order, therefore, does not call for interference and the Criminal Appeal stands dismissed accordingly. The bails granted by this Court are cancelled and the Sessions Court is directed to arrange for arrest of the appellants accused.

rmr. [K.A. Puj, J.]